No. 80-1845

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ALEXANDER L. STEVAS
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In the Supreme Court of the United States

OCTOBER TERM, 1980

LENNOX INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) of the National Labor Relations Act by denying an employee's requests for union representation and proceeding to conduct an interview which the employee had reasonable grounds to believe might lead to disciplinary action against him.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-10) is reported at 637 F.2d 340. The decision and order of the National Labor Relations Board (Pet. App. A-11 to A-23) are reported at 244 N.L.R.B. No. 88.

JURISDICTION

The judgments of the court of appeals (Pet. App. A-51 to A-52) were entered on February 17, 1981. A timely petition for rehearing was denied on March 19, 1981 (Pet. App. A-53 to A-54). The petition for a writ of certiorari was filed on May 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), provides:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, is set forth at page 2 of the petition.

STATEMENT

1. In January 1978, petitioner transferred Paul Nestle, an assembly line employee, to a line producing a different product from that on which he had previously worked. This line's workers, particularly Nestle, had difficulty maintaining the desired production speed and Nestle was transferred four times to different tasks. During the first two weeks in February, Nestle's work was closely watched by his immediate supervisor, Leo Ary, and by other supervisors. During this period, Ary told Nestle that his work "just wasn't 'going to get it' " and that if he did not increase his speed, Ary would have to take action against him (Pet. App. A-29).[1]

On February 16, 1978, Ary approached Nestle at his work station and said he wanted to speak to him

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[1] Disciplinary action in the Company's plant was initiated by first-line supervisors in consultation with their superiors, including Fred Boenker, manager of final assembly, to whom Ary and eight other first-line supervisors reported. When a decision to take disciplinary action was made, the first-line supervisor transmitted a written notice of discipline to the affected employee (Pet. App. A-27 to A-28).

at his (Ary's) desk. Nestle asked to have a committeeman present.[2] Ary replied that Nestle did not need a committeeman. Nestle said he continued to want one, and asked another employee, who was standing nearby, to witness his request. Ary and Nestle then proceeded toward Ary's desk. Before they arrived, Ary interpreted a remark by Nestle as a threat and consequently asked him to proceed to Assembly Manager Boenker's office (Pet. App. A-14 to A-15, A-35).

There, Ary told Boenker that Nestle had threatened him. Nestle denied the charge. Boenker asked whether there were any witnesses and was informed that there were none. Boenker then handled a telephone call, and, while his attention was thus diverted, Ary and Nestle expressed their animosity toward each other. After finishing the call, Boenker told Ary and Nestle that he was aware of their feelings but wanted to see them get along (Pet. App. A-15, A-36).

Boenker also said that he had been watching Nestle and another employee and believed they were instigating a production slowdown. Nestle responded that he was unused to working on small units, and asked to be transferred back to his former job. Nestle then asked for a committeeman to represent him. Boenker replied that, if he thought Nestle needed a committeeman, he would get one. Although

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[2] The collective bargaining agreement between petitioner and the United Steelworkers of America, AFL-CIO, Local 4629, provided in pertinent part (Pet. App. A-27):

> Any supervisor meeting with an employee for the purpose of issuing written disciplinary action will so advise the employees [*sic*] so that the employee, at his discretion, may invite either his committeeman or the union President or a pre-designated alternate officer to attend. The committeeman or union officer must work the same shift as the employee.

Nestle indicated that he continued to want a committeeman present, none was called and the discussion continued. Boenker said that he could not change Nestle's job assignment and reminded Nestle that his production would have to improve (Pet. App. A-15, A-36 to A-37).

2. The Board, relying on *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), found that Nestle reasonably feared that discipline would result from the interview with Ary and Boenker, and concluded that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by nevertheless denying Nestle's request for representation and proceeding with the interview. The Board explained (Pet. App. A-16; footnotes omitted):

> In view of the prior remarks made to Nestle by Ary that he needed to acquire greater speed and the job he was doing was not "going to make it," it is apparent that Nestle entertained a reasonable fear of discipline when Ary requested that he go with him to Ary's desk. At no time did Ary dispel the apprehension expressed by Nestle in requesting union assistance by advising him that no disciplinary action was being considered. On the contrary, Ary's response was limited to denying this request by telling him that he did not "need" such assistance. Such an equivocal response is not sufficient to allay Nestle's fear of disciplinary action, as Ary did not give any reason why the employee did not "need" assistance. In this circumstance, the comment that an employee does not need assistance is not sufficient basis to disregard an employee's request.

The Board also concluded that petitioner violated Section 8(a)(1) of the Act when it denied Nestle's second request for union assistance which was

prompted by Boenker's accusation that Nestle was engaging in a slowdown of production (Pet. App. A-17). The Board rejected petitioner's contention that Nestle waived his right, if any, to union assistance by failing to repeat the request (made on the shop floor) at the inception of the discussion in Boenker's office, observing (Pet. App. A-17): "Once Ary actually initiated the interview in Boenker's office, the *Weingarten* violation had been established, as the employee who has made a request for union representation on the plant floor need not repeat the request at the interview."

3. The court of appeals upheld the Board's decision and enforced its order. In so doing, the court rejected petitioner's contention (Pet. App. A-4) that the interview was not investigatory and that Nestle could not have reasonably feared that it would result in discipline, distinguishing a "meeting * * * designed simply to show an employee how to improve his work performance [as to which] no right to union representation inheres" from the instant case where the employee "was asked questions concerning both his poor work performance and his less than friendly altercation with his supervisor" (Pet. App. A-6). The questioning of Nestle was "investigatory in that it [was] designed to elicit responses which might well result in discipline against the employee" (*ibid.*). The court further concluded that the Board's finding that Nestle reasonably feared discipline as a result of the meeting was supported by substantial evidence (Pet. App. A-8 n.8).

The court also rejected petitioner's contention that Nestle should have requested the presence of a union representative at the outset of the meeting in Boenker's office because Boenker was unaware of the request made to Ary and because the meeting con-

cerned not only Nestle's work performance but his confrontation with Ary as well (Pet. App. A-8). The court agreed with the Board that the two meetings were a " 'single, interrelated episode' " and that "supervisor Ary was present at the second meeting as well as the first, and * * * was well aware of Nestle's request" (Pet. App. A-9). The court concluded (*ibid.*):

> The rationale of *Weingarten* does not require an employee to repeat his request for union representation each time the subject changes during a meeting with company officials. Such a rule would be both burdensome for the employee and tedious for the company officials. As long as one or more company officials are aware of the employee's desire and request for the presence of a union representative, a single request will suffice for the multiple subjects of a single meeting, or for multiple meetings which are part of a "single, interrelated episode," as here.

ARGUMENT

The decision of the court of appeals correctly applies the principles enunciated by this Court in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), and there is no conflict among the circuits. Further review therefore is unwarranted.

In *Weingarten*, the Court held that an employee has the right to union representation at an investigatory interview that he reasonably fears will result in disciplinary action. 420 U.S. at 257. In the instant case, the Board found, and the court of appeals agreed, that Nestle reasonably feared that discipline would result from his meetings with Ary and Boenker.

Petitioner urges, however (Pet. 6), that an employee should not be entitled to union representation

unless the employer actually intends to discipline him or in fact does so. This suggested rule is contrary to *Weingarten*, which requires only that an employee's belief that he will be disciplined be reasonable. There, as here, the employee was not in fact disciplined. 420 U.S. at 255-256. Moreover, under *Weingarten*, the reasonableness of an employee's fear of discipline is to be measured by objective standards since consideration of an employee's subjective state of mind would " 'involv[e] an endless and unreliable inquiry.' " 420 U.S. at 257 n.5, quoting *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 608 (1969). To condition the right to union representation on the employer's undisclosed subjective intent would involve an equally endless and unreliable inquiry.[3]

Contrary to petitioner's contention (Pet. 4-8), the decision below does not conflict with *Alfred M. Lewis, Inc.* v. *NLRB*, 587 F.2d 403, 410 (9th Cir. 1978), or *AAA Equipment Service Co.* v. *NLRB*, 598 F.2d 1142, 1146 (8th Cir. 1979). Neither case holds that union representation can be denied on the basis of an employer's undisclosed intent not to impose discipline. In *Lewis*, the court held that certain employees were not entitled to representation at interviews where discipline was imposed on the basis of a *prior* investigation because "it is the presence of an investigatory element which gives rise to the right." 587 F.2d at 411. At the same time, the *Lewis* court

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[3] Where an employer discloses its subjective intent—*i.e.*, where it expressly assures an employee that he or she will not be disciplined—a request for representation need not be honored since, as the Board has held, the employee cannot in such circumstances reasonably believe that discipline will be imposed. *General Electric Co.*, 240 N.L.R.B. 479, 480 (1979); *Amoco Chemicals Corp.*, 237 N.L.R.B. 394, 397 (1978). Thus, petitioner's assertion (Pet. 7, 11) that the court of appeals' decision will prevent employers from conducting any " 'work-related' employer-employee discussions" is groundless.

upheld the Board's conclusion that the employees had a right to representation at "counseling sessions" where they were questioned about their failure to meet production quotas, because such questioning justified the employees' fear that the interview would lead to disciplinary action. *Id.* at 410. *AAA Equipment Service* involved a parking lot encounter between an employee and two supervisors during which the employee refused even to allow the supervisors to say why they wanted to talk to him. The court found that the employee had resolved not to talk to the supervisors on any subject without a shop steward present, that the supervisors had intended to have only "a run-of-the-mill conversation * * * that involved 'the giving of instructions or training or needed corrections of work techniques,' " and that "there was no reasonable basis for [the employee] 'to fear that any adverse impact [would] result from the interview' even if the chance encounter on the parking lot can be termed an investigative interview." 598 F.2d at 1144. In the case at bar, there was, as we have demonstrated above, ample reason for Nestle—who was accused of threatening his supervisor and of deliberately slowing down production—"to fear that [an] adverse impact [would] result from" the meetings with Ary and Boenker.

Petitioner further contends (Pet. 8-11) that Nestle waived his right to representation in the meeting with Boenker because he did not repeat the request made to Ary on the shop floor. This assertion merely takes issue with the Board's finding, upheld by the court of appeals, that the transactions here at issue constituted "a single, interrelated episode" in which petitioner was on notice that Nestle desired union representation. That essentially factual question raises no issue warranting resolution by this Court. *Universal*

Camera Corp. v. *NLRB*, 340 U.S. 474, 480-81 (1951). In any event, the Board's finding is plainly correct. As shown in the Statement, only a brief period elapsed between the two meetings (*i.e.*, the time required to go from the work floor to Boenker's office); Ary was aware of Nestle's request for union representation and was an active participant in the second meeting;[4] the new topic introduced at the second meeting—Nestle's alleged threat to Ary—increased, rather than diminished, the risk of discipline and hence the likelihood that Nestle would desire representation. Finally, petitioner's submission (Pet. 10-11) that repeated requests for representation should be required whenever a new subject is introduced or a new supervisor joins an interview is contrary to this Court's teachings in *Weingarten*. Where an employer does not respond to a request for representation but instead raises new and more serious allegations of misconduct, a "fearful or inarticulate" em-

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[4] Petitioner concedes (Pet. 9 n.2) that the Board has properly held that "an employee may make a request for union representation while on the plant floor, and need not repeat the request at the office if the official there is aware of the request." *Roadway Express, Inc.*, 246 N.L.R.B. No. 180 (1979). However, it contends (Pet 9) that this rationale is inapplicable here because Ary, in the second meeting, "was acting as the complaining witness rather than as the presiding official." This argument overlooks the uncontested finding (Pet. App. A-28) that Ary could initiate disciplinary action and that he normally consulted with his superiors when he believed such action was warranted. Thus, at the meeting in Boenker's office Ary was not merely relating the facts so that Boenker could decide what, if any, disciplinary action was appropriate; Ary was seeking assistance in a decision he ultimately would make. Accordingly, there is no basis for suggesting that a representation request made to him was directed to the wrong person.

ployee can hardly be expected to repeat the previously-ignored request. As the court of appeals correctly recognized (Pet. App. A-5), placing the burden on the employee to make multiple requests for representation in this situation would "perpetuate[] the inequality [of bargaining power] the Act was designed to eliminate, and bar[] recourse to the safeguards the Act provided 'to redress the perceived imbalance of economic power between labor and management.'" *NLRB* v. *J. Weingarten, Inc.*, *supra*, 420 U.S. at 262 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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